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MONTESQUIEU AND SOCIOLOGICAL JURISPRUDENCE

IN a highly flattering letter Mr. Justice Holmes has suggested a criticism of my book on the sociology of law (*Grundlegung der Soziologie des Rechts*) in that he finds therein no reference to Montesquieu. I accept the criticism, but beg that no inference may be drawn therefrom, since in my eagerness to explain my own views on the sociology of law I neglected to give a full account of the history of the subject. But my reverence for the author of *L'Esprit des Lois* is very great. Hence in this paper, seeking to pay due honor to the illustrious American jurisconsult, I shall endeavor to make amends for the omission and to render justice to one of the first sociologists of the past in the only way worthy of his genius, namely, by telling the whole truth about him, as I see it, not sparing necessary criticisms.

When Montesquieu began to write, the doctrine of the law of nature, as it had been laid down chiefly by Hugo Grotius and Pufendorf, was at the height of its influence. Its followers assumed that human society had been established by a social contract, express or implied, and that law was only a corollary of this original contract, wherefrom it might be deduced by scientific ratiocination. As the social contract was the same in every part of the earth, its logical consequence, the law of nature, must also be the same everywhere and at every time; but as it was not always clear, it must be unveiled by science. It formed the basis of and the standard for the municipal law, which miscarried whenever it deviated from the principles thereof.

Montesquieu, too, talks of the law of nature, but in a different sense. He uses it to mean the natural instincts of mankind which must not be overridden by law; the desire to live in peace with one's fellows, the sexual impulse, self-defense, the necessity of search for food, the modesty of woman. A natural law of this description is obviously too barren and of too little import to serve as a pattern for the law of a society.

His own views on the science of law are expressed in the prelimi-

nary chapter of his book in words which must be quoted in the original:

[Les lois] doivent être relatives au physique du pays; au climat glacé, brûlant ou tempéré; à la qualité du terrain, à sa situation, à sa grandeur; au genre de vie des peuples, laboureurs, chasseurs, ou pasteurs; elles doivent se rapporter au degré de liberté que la constitution peut souffrir; à la religion des habitants, à leurs inclinations, à leurs richesses, à leur nombre, à leur commerce, à leurs mœurs, à leurs manières. Enfin elles ont des rapports entre elles, elles en ont avec leur origine, avec l'objet du législateur, avec l'ordre des choses sur lesquelles elles sont établies. C'est dans toutes ces vues qu'il faut les considérer.

Thus in strict contradiction to the law-of-nature school, which assumes a uniform, everlasting law to be inferred once for all from a supposed contract which is essentially identical throughout the whole world, Montesquieu teaches that law depends on multifarious conditions and varies at once with these conditions. This idea of the correspondence of law with outward circumstances perhaps marks the greatest progress effected by a single man in legal science. But here we must denounce a certain vagueness which appears in the very wording of the text. The French term *devoir*, used by Montesquieu, signifies both what ought to be and what must be. In the passage quoted above and generally throughout the whole book, Montesquieu takes it in the first meaning. In the main, therefore, his book deals with legislative politics. But he was so far influenced by the law-of-nature school as not to draw a sharp line between the law that ought to be and the law that actually exists. "The law," he says, "is but human reason governing all peoples, and the public and private laws ought to be (*doivent*) only particular cases to which human reason is applied." Moreover he is aware that we may succeed in mastering legislation only by understanding the real causes of the existence of law. Therefore his point of issue shifts slowly. With him the two questions, how law is to be constituted to fit its outward conditions, and how it is necessarily shaped by those conditions, often flow into one another. But in this way, along with a critical discussion of the ends of law, we get a sociological explanation of law by its causes. In fact *L'Esprit des Loix* must be considered the first attempt to fashion a sociology of law.

Though in the mind of their author secondary and incidental only, the sociological parts of the book are to-day of the greatest scientific interest and before all attract the attention of a modern sociologist. Let us begin with them. The idea of a sociological science of law, while generally loose and wavering, is on some occasions perceived by Montesquieu very distinctly. In the preface he asserts that he does not write in order to criticise what exists, but to give the reasons and principles thereof. In another passage, fearing that the reader might be shocked by his examination of the principles of monarchy, he emphatically protests that he does not speak of what should be, but of what really is. In speaking of polygamy, he exclaims: "I do not justify customs, I give the reasons thereof." Numerous purely sociological disquisitions, free from any views on legislative politics, are scattered through the book.

As law is essentially a form of social life, it cannot be explained scientifically otherwise than by the working of social forces. The natural circumstances brought forward by Montesquieu, geographical configuration or climate, cannot have any influence on law except by operating on society, which in turn acts on law. Thus in order to discover the social foundation of law we must seek the very form in which it is engendered by society. It is not the rule of law as we find it in the codes, the textbooks, and the law tracts. The rule of law does not proceed directly from society, it is devised by legislators and jurists. Society itself fashions only the legal order of the fundamental social institutions, the order of clan, family, village community, property, contract, inheritance. The ruling of this legal order, without any trace of the rule of law properly so called, constitutes the only law which may be found in primitive tribes or lower stages of civilization, and even in our own time a great deal of law still consists only in the legal order of social institutions. From this primary legal order the rule of law is derived by jurists and legislators by very intricate processes which I endeavored to expound in the *Sociology of Law*. The rule of law cannot be understood sociologically without considering the legal order from which it arises. Nevertheless, the great majority of sociologists have attended only to the rule of law, not the primary legal order. As in this way they miss all the intermediate links, formed by legal institutions, between the rule of law and society, the whole treatment of the subject becomes unsatisfactory.

To Montesquieu, also, law presents itself as a body of rules. Yet he looks behind and guesses, though in a very indefinite way, at some of the outlines of society in the background. The term "society," which he often employs, does not mean for him society in the modern sense; it signifies only the state, as in the terminology of the law-of-nature school, which he adopts. But even society taken as state is in his meaning more than the artificial thing imagined by the law-of-nature school, shaped by a contract supposed but never settled. It is a living body, begotten by natural forces and in a certain degree existent independently of state government. In the *Lettres Persanes* he derides the inquiries into the origin of society as they had been made by contemporary followers of the law-of-nature school: If men did not form societies, if they lived asunder and ran away upon seeing their mates, we might ask for the reason; but as they keep together, the son remaining at his father's, this is society and the real cause of society. Some passages hinting at the natural foundation of the state are also to be found in *L'Esprit des Lois*, especially in the chapter dealing with the law of conquest.

The modern conception of society in contrast to the state presents itself to the mind of Montesquieu under various disguises, the most important of which is what he calls the "general spirit." "Several things govern men," he says, "climate, religion, laws, principles of government, precedents, customs, manners; in these the general spirit has its origin, being the offshoot thereof." We may substitute the term "society" here for "general spirit" without any difficulty, and we shall get a much more definite and precise notion of the relations of law and society than through the teaching of the German historical school, where the "general spirit" reappears, very obscure, under the name of popular consciousness (*Volksbewusstsein*).

The "things governing men," to which we may add, quite in the sense of Montesquieu, the economic situation, play their part in modern sociology as elements of social life. There is a remarkable difference between the passage last quoted and the parallel passage quoted in French from the first book at the outset. In the former, law is mentioned along with climate, religion, principles of government, precedents, customs, manners, among the constituents of the "general spirit," whereas in the latter only the correspond-

ence of law with these things is emphasized. If the difference is not an accident, we must see therein a perception that law is a component of social life along with the other "things governing men" and that each of them determines the others. It is an admirable early suggestion of the social consensus imagined by Auguste Comte and Herbert Spencer. We find it again in an observation as to the English people: "I do not pretend that climate has not produced a great part of the laws and manners of this nation, but I say that the customs and manners of this nation may have a great relation to its laws." There too the interdependence of all the elements of social life is assumed. Thus, in the opinion of Montesquieu law is shaped by society and shapes it at the same time. This is in strict contradiction with the general opinion of his age, namely, that law was imposed on society from the outside by a legislator, an idea, however, which has left many traces in his book.

Again some twenty years before Blackstone, who, however, learned much from him, and half a century before Buckle and Savigny, he perceived that the history of law was much more than a serial relation of curiosities, he saw that it was a means to explain the structure of a society by showing the progress of its institutions, and he guessed already the importance of historical continuity for understanding the present by the past. To that end he devotes learned discussions to the Roman law of inheritance, to early French procedure, and to the feudal law of the Middle Ages. Eighty years before Roscher and Knies he frames a history of economics and inserts in his book the admirable chapters on the economic bearing of the conquests of Alexander the Great and others on the progress of the world's commerce. A century before Karl Marx he insists on the intimate connection of the economic situation and its "legal superstructure," and he is probably the first to deal with economic problems — exchange, agriculture, money, population, colonization — in a juridical book. About a hundred and twenty years before Ratzel and Brunhes he foreshadows political geography and anthropogeography in the chapters on the influence of climate on law, slavery, domestic relations and government, and in the chapters on the influence of geographical configuration upon law. We may find there, along with many desultory and superficial observations, such ingenious reflections as this: "There are different requirements of different climates which have shaped different manners

of life, and out of the different manners of life result different laws." That is a clear conception of a society, especially in economic relation, formed by geographical circumstances and forming the law in accord with its exigencies. Almost a century and a half before comparative and ethnological jurisprudence commenced to collect stones and bricks for the building which is still to be erected, he started to compile data as to the laws and customs of China, Japan, India, Persia, and even of savage tribes. Moreover, there are in his works treasures of hints and observations as yet untouched. Perhaps there is no topic of sociology of law for which *L'Esprit des Lois* does not contain a valuable suggestion.

In his youth Montesquieu applied himself to natural history and probably yielding to the turn of mind acquired in this occupation, he employs largely the inductive method of scientific research even in matters of law, being thus in this direction also a precursor of modern tendencies. This is a somewhat striking point. In the preface he seems to give quite a different account of the way in which he arrived at his leading ideas:

"I began my work again and again; I have a thousand times thrown away the pages I have written. I felt every day my paternal hands fall. I followed my subject without any preconceived aim; I knew neither rules nor exceptions; I did not find truth but to lose it. But as soon as I discovered my principles, all I sought came to me, and I saw my work begin, grow, advance, come to an end."

And again:

"I laid down my principles and I saw the particular cases yield to them of themselves; that the history of all nations was only the consequence therefrom."

That is seemingly the genuine scholastic method, beginning with principles and progressing to particular cases by logical ratiocination. But in reality the principles Montesquieu starts with are not contrived *a priori*. They are all derived from facts he collected, scrutinized, and turned over in his mind during the twenty years he was engaged in his work. Indeed the preface gives a very impressive view of the laboratory of a genius and of his self-deceptions. Great thinkers often believe they have drawn their fundamental ideas from a sort of sudden enlightenment, whereas they are grown subconsciously in the long course of years, and what appears to be the

intuition of a moment is only the discharge of a mind filled with priming powder at the expense of a life.

His statement of the principles of the three forms of government, virtue in the republic, honor in the monarchy, fear in the despotism, certainly looks like a genuine *a priori* proposition. Yet it is inferred from innumerable facts. In his mind, republics are the small city commonwealths of antiquity and later of Italy and the Netherlands; monarchies are the feudal and half feudal realms of France and England in the Middle Ages and in his time; despotisms are the great empires of the Orient, the Roman Empire in decay, and Russia. What he calls principles are the moving forces of these states. His true teaching is that the three forms of government which appear in history are each of them directed and determined by forces of a certain description, depending upon size, geographical configuration, climate, customs, manners, and the other "things governing men." The "principles" are but a terse and striking characterization of the forces resulting from the social structure of the states with which the three forms of government have been connected in history; and only his profound knowledge of history and his close observation of the events of his time enabled him to put it as he did. Here his superiority to his predecessors who had treated this subject, Aristotle included, becomes apparent; for he does not think of the forms of government as empty schematic formulas and of their effects as consequences of purposely-framed ordinances, but conceives them, rather, as the upshot of the working of natural forces in society.

In consequence perhaps no legal author has ever been more anxious to amass facts. His works, and above all his *L'Esprit des Lois*, are literally crowded with facts — social, historical, economic, ethnological. He was helped in accumulating these facts by his amazing scholarship in ancient history and literature. Also he had read thoroughly the relations of travelers in foreign countries, and he utilized his own observations, which he was admirably equipped to make. Then, too, his long journeys in England, Germany, Austria, and Italy, his frequent periods of residence in Paris, and his brief career as a courtier at Versailles, gave him an excellent opportunity.

It is true we find in *L'Esprit des Lois* rather hints, suggestions, and materials for a sociology of law than in any an investiga-

tion thereof. But from among these scattered bones there springs up already the nucleus of the future science, the perception of some natural accord with law in social life. Certainly the adherents of the law-of-nature school used to write of the accord of nature with law and the legal and moral standard as varieties of the same species; and Montesquieu, too, expresses this view in his preliminary chapter. But that is an idea of quite a different order. It does not mean that law and morals are subject to some natural conformity to law, but only that they are a form of natural law taken as a natural phenomenon. On the other hand, the mercantilists and physiocrats, both predecessors and contemporaries of Montesquieu, were already investigating economic laws. But although to-day we may consider the laws of exchange and production which they dealt with as in some sort social laws, in their opinion these were more laws of things exchanged and produced than laws of human action with respect to them. The sociological law realizes the law of causality in application to human action in society. In the sociology of law it would stand for the notion that the arising of legal standards and their effects are subject to a causality of the same description as other phenomena of nature. That is exactly the idea which underlies the sociological and political investigations of Montesquieu — in identical circumstances human beings will behave in an identical way. His inferences for legal science are that under the same conditions the same law will arise, that under the same conditions the same law will have the same effect, and that under different conditions it will have a different effect. In this connection several heads of the chapters of the twenty-ninth book, which deals with the composing of statutes, are very instructive, as, for instance: "That rules which seem to be the same have not always the same effect"; "That rules which seem to be the same have not always the same motives"; "That rules which seem to differ may originate from the same spirit"; "That rules which appear identical may sometimes be very different."

Therefore the facts accumulated by Montesquieu do not play the rôle of mere collectanea. They are illustrations of general laws, implied by them but not always expressly determined by the writer. For, in his own words, "it is not important to cause people to read, but to cause them to think." His true meaning is this: I give you the facts, consider them thoroughly. You will then perceive that

certain causes have produced an effect. Thence you may infer the general law that everywhere under the same conditions the same things will happen. If you will take notice of the conformity to law shown by the facts I have adduced, you will see the future in the present and you will be able to arrange your activities accordingly. This train of thought obviously goes back to Bacon and is much more British than French; it is much nearer kin to Locke and Hume than to Cujacius, Donellus, Voltaire, and Rousseau.

A chapter entitled "How Law may Contribute to Fashion, Customs, Manners and the Character of a Nation" furnishes a striking example of his turn of mind. In this chapter he aims to show that certain features of national character are necessarily developed by a free constitution. We perceive at once that he is speaking of the English people, and the chapter is perhaps the most subtle, refined, and accurate analysis of English national character which has ever been written. Yet there is no express mention of Great Britain or England or the English at all. The chapter is conceived in general terms. All the features of the English national character, including peculiarities in comparison with France of his time, such as the modesty and isolation of women, the luxury and extravagance of the gentry in the eighteenth century, and even such historical events as the conquest and oppression of Ireland, which, of course, is only hinted at and not mentioned expressly, are explained by the working of a free constitution, and it is supposed that, given the same conditions, these phenomena would be met with everywhere. No doubt the effects of constitutional law are highly exaggerated. The national character is the result of innumerable circumstances, most of which it is impossible even for the modern sociologist to discover. The constitution is much more the effect than the cause of national character. But we may overlook this. The most noteworthy point is the anxiousness of the author of *L'Esprit des Lois* to hold only to the general bearing of a special case so that he does not in form speak of the case at all.

This tendency appears also in those parts of his book which treat of legislative politics. We must not, however, lay too much stress upon his projects of reform. They are born of practical sense and a deep sentiment of justice and morals. They are usually excellent in style, marked by keenness and penetration, and some of them, such as the deadly sarcasms on negro traffic or the famous letter of a

Jew to the Holy Inquisition upon the *auto-da-fé* of a Jewess nineteen years old, a letter overwhelming by its bitter irony, will rank with the masterpieces of literature. But after all, they are not above the average political wisdom current in his time. The reforms of constitutional law, criminal law, and civil law for which he strived have mostly become matters of course and his subtle arguments and fervent attacks against despotism, slavery, and torture, and his pleadings for some restriction upon the prosecution of heresy, although very bold when written and very impressive to his contemporaries, now appear commonplace. But they may still be recommended to those who are prone to excuse their indolence with respect to public affairs by the assumed impossibility of achieving any progress. The progress is evident if two centuries ago a genius like Montesquieu was required to urge as improvements what to-day are matters of course.

In all these things Montesquieu is only a child of his age: humane, philanthropic, rationalistic, daring, ingenious, witty; but after all in these respects he does not mark any substantial progress. Yet he is infinitely superior to the publicists of the eighteenth century in his leading idea that legislation must be put on a scientific basis. That is exactly what he proposes in the preface of *L'Esprit des Lois*. He teaches that the people must be enlightened. When plunged in ignorance men have no doubts even while committing the most fatal blunders. When sufficiently instructed they tremble even while doing good. They see the disadvantages of reforms; they suffer from the bad, being afraid of the worse; they allow the merely good, hesitating to better it; they consider the parts in order to understand the whole; they examine the causes to determine the effects. In order to arrive at the knowledge he desires, man must be instructed in human nature. (*De connaître sa propre nature lors qu'on lui montre.*) What he calls human nature, in the language of our times may be expressed by the phrase "human society." By enlarging the insight into society and its forces for which knowledge of human nature is the condition, we may realize the control of society by legislation just as an engineer who directs a steam engine controls it with the help of his knowledge of the mechanism. Montesquieu neglects administration and judicature, which give still greater opportunity to control society than does legislation.

We can trace the impress of this thought in many parts of the book dealing with legislative politics, especially in those parts treating of criminal law. But it may be preferable to give merely some comments on his views on liberty. Liberty, as he uses the word, is nothing but the life of society in contrast to the government of the state. In contrast with Hobbes and the law-of-nature school, he perceives distinctly the claim of society to a life independent of the state and the chief object of his inquiry is to protect it from the encroachments of state power. And now we come to the chapter of *L'Esprit des Lois*, entitled "*De la Constitution d'Angleterre*," a chapter which is one of his chief titles to glory and perhaps more than any other is destined to immortality.

The arrangement of this chapter is very like that of the chapter spoken of above in which he treats of the influence of the political constitution upon the character of a nation. There is no doubt that it is founded entirely on observation of the working of the British constitution. Yet there is still no mention of Great Britain except in the title and in a few words at the end of the chapter. The question with which he is concerned is not the frame of the British constitution, but how the constitution of a free people must be framed. And he examines the principles of this constitution "where liberty will appear as in a mirror" only because, to quote his words in the preceding chapter, "there exists a nation in the world which has political liberty for the direct object of its constitution." Here, too, he intends a general law embodied in a special case.

The chapter in question sets forth the famous doctrine of the balance of powers. The three branches of government—legislation, administration, and judicature—must be intrusted by the constitution to different bodies and must be kept in perfect equilibrium in order to make impossible any arbitrary discretion on the part of an officer of state; the legislative power being confined to the settlement of general rules and to control of the executive power on general lines without regard to any special case; the executive power being limited to foreign politics and military affairs; and the judicial power having for its only task the decision of lawsuits and criminal prosecutions on the basis of statutory law. In this way each power is checked by the two others and all oppression and extortion is obviated. And as the person who wields military force

might not care too much for constitutional checks when planning an assault upon liberty, Montesquieu imagines a military organization which makes the army quite inefficient at home without paying much respect to its efficiency abroad.

Accordingly liberty, in the opinion of Montesquieu, means the condition of society in which it is not restricted by government beyond limits determined by legislation, which in turn, in accordance with the views on representative government which he entertains, is in functional connection with society. The judicial power also, though in a different way, is intrusted to delegates of society. This doctrine has been thoroughly disputed, and in fact it is in part vague and incomplete and it does not avoid contradictions. In the first place, we are told that the legislative power merely states general rules, enacts statutes, and settles the budget, but it does not interfere with special cases. As the executive power is concerned only with affairs of international law, and the judicial power with affairs of civil law, we might assume that the executive power had nothing to do with domestic affairs. But there is plenty of domestic business which cannot be provided for by general rules and cannot be dispatched by judges. We must inquire for the department which is to manage it. Subsequently Montesquieu seems to suppose that the executive power has for its function the execution of statutes and ordinances made by the legislature. And he says that the ministers charged by the king with this duty of executing them are accountable to the legislative power therefor. But the executive power goes beyond the boundaries of its competency described in the first instance. Finally there is a great deal of governmental business which does not consist in the execution of statutes, and as it is not connected with any expense independent of the budget, there is no hint in Montesquieu which power has to do with it. These are the most striking inconsistencies in Montesquieu's exposition, but we may easily find much more of the same description.

There are two inaccuracies in point of fact. The balance of power imagined by Montesquieu really never existed either in Great Britain or elsewhere. The English Parliament was at first only a court of justice. It never became an exclusively legislative and controlling body. It has still at present executive and judicial work to perform and it had much more of this work in the time of Montesquieu. Much of the authority of the king and consequently

of the Cabinet in Great Britain, and moreover the authority of some boards may with good reason be considered legislative; the king in the past was a judge also and has never been deprived by law of this function, some judicial power being still exercised by his officers. Courts in Great Britain and elsewhere are not restricted to the application of statutes as Montesquieu maintains in consequence of his misconception of the judicial function. British judges find law themselves and settle rules of judicial law. Thus in the sense of Montesquieu they are legislating.

Because of these and some other deficiencies which have been pointed out, especially by German scholars, the theory of Montesquieu does not hold ground in the scientific world. But after all, Montesquieu saw more and deeper than his learned critics. It is precisely the merit of Montesquieu that from the embarrassing perplexity of state institutions he disentangled the elements of the fundamental functions they subserved, and singled out the concrete bodies by which those fundamental functions were exercised in Great Britain in his time. State authorities, magistrates, officers, boards, may arise for governmental purposes, may appropriate and usurp in the long run very disparate jurisdictions, and still there are the needs of governmental business, the tendencies of social life, which determine them in their growth, and the insight of a genius will distinguish in their intricacy the great lines of development and point out the forces driving in a certain direction.

That is exactly what Montesquieu did. He observed the three branches of governmental power which must necessarily exist in any state, be they actually allotted as they may. He saw the general tendency to separate them and attribute them to different boards or bodies. He perceived the importance of disconnecting and balancing them for the individual welfare and the freedom of the people. He understood the very meaning of parliamentary control and of the responsibility of the Cabinet. In all this he cared much more to delineate the essential traits than to accurately set forth the details. In order to bring out the true direction of the movement he neglected the secondary forces which might produce accidental deviations. In this turn of his mind he is essentially French. What is not plain is not French. (*Ce qui n'est pas clair n'est pas français.*) Certainly he had a great predecessor in Locke, but it is just his additions and omissions which give general bearing to

his teachings, whereas Locke's statements apply only to the British constitution. In this part of his book, which we must recognize as a masterpiece, Montesquieu proved himself a profound and keen observer, capable not only of seeing what had grown, but of foreseeing what was growing. Palpably the British constitution has since followed in the way at which he hinted. At present it corresponds to his description much more than it did at the time when he wrote. The framers of the constitution of the United States adopted a great part of his teaching, especially with respect to the balance of powers. The constitution of the first French republic and that of the Restoration were largely influenced by his doctrine. But most of all the constitution of Belgium, the model of written constitutions in Europe and other parts of the world in the nineteenth century, shows the same influence. Thus the eleventh chapter of the eleventh book of *L'Esprit des Lois* became an event in the world's history.

In still another part of his work, namely, in that part which deals with federal republics, he proved to be not only a learned scholar and an observer of wonderful acuteness, but a guide and a prophet in constitutional politics. He saw that the only kind of republican government which he knew by experience, namely, the city commonwealths in antiquity and later in Italy, prospered when small and weak but were exposed to the danger of conquest, and as soon as they grew in size and force became subject to corruption of all kinds. Therefore he imagined that the best line for them was federative government. He had before his eye the federation of republics in Switzerland, the federation of the Netherlands and the Holy Roman Empire of Germany, which he conceived to be a federation of monarchies and republics. He inferred therefrom that a federation of small monarchies was wholly impossible, as it was not to be found in history, and that a federation of monarchies and republics was necessarily deficient, as the German Empire then obviously was, because the spirit of monarchy, requiring war and enlargement, was incompatible with the spirit of a republic, which demands peace and moderation. But a federation of small republics would thrive, as was proved by Switzerland and the Netherlands. By association they would gain military force to resist conquest and they would preserve the advantage of a pure republican government within. The marvelous prosperity of federal republics in

America and Australia has since demonstrated the correctness of his views.

But it is a dangerous thing to be a pioneer. The idea of building a sociology of law with the means and materials of the eighteenth century is one of astonishing grandeur, but here, as elsewhere, grandeur is separated from the ridiculous only by a pace. The efficiency of mental effort is conditioned not only by the merits of the originator but also by the whole condition of the country. Even a genius running before his time cannot entirely get away from the atmosphere wherein he breathes. He is checked at every step by the prejudices and shortcomings he shares with his contemporaries. On the other hand, he is deprived of the support which science could afford, since it has not yet gathered the materials for the solution of the questions which he agitates, and he does not exercise a real influence on his contemporaries who can only grasp what is within the reach of the understanding of their time. The fate of the great achievements of Montesquieu resembles in a certain measure the fate of the steam engine constructed by Denys Papin in the seventeenth century which, imperfect as it then necessarily was, remained unnoticed at the time in order to be discovered some centuries thereafter. Montesquieu was admired in his age chiefly for that part of his work which was perishable and has passed away. His most important scientific labors have not been attended to. Now they are forgotten, superseded by the scientific progress accomplished in later times, and have to be dug out from the dust by his biographers.

In the first place, the foundation of his work is extremely unreliable in point of fact. He was indeed a great scholar in ancient history and in the history of the early Middle Ages, but of course the history which was at hand for him was not the critical history which we have to-day. He accepts every word of the miracles related by Livy and Dionysius for truth. He believes in Lyscurgus as well as in Romulus and Remus. He knows all about the constitution of Rome in the period of the kings and immediately thereafter with respect to which modern historians most unhappily confess they know nothing at all. He is much better informed as to the Franks in the sixth and seventh centuries than Sohm and Brunner. So with the sources to which he had access with reference to savage tribes, to China, to Japan, to Persia, to Turkey, to the

Tartars, and to the Muscovites. We must highly respect his zeal to know about these distant peoples and realms. But we cannot overlook the fact that the relations of travelers, reports of missionaries, and historical works of his day have ceased to have any scientific value.

Moreover, the task he essays exceeds even what modern sociologists would be able to perform. In order to explain law by society we must have a thorough knowledge of the economic and social situation of the society in question. To the extent that we are not sufficiently helped by ancient authors we must seek supplementary information in the remains of past ages, in monuments, in furniture, in instruments, in vase pictures, in inscriptions, which give us in some directions much more light than the written sources. The scientific utilization of antiquities (*Altertümer*), indispensable for the knowledge of social and economic relations, is even now in embryo. When Montesquieu was at work, the compilation and scrutiny of such data had just begun. Unfortunately, Montesquieu did not take account of what existed in his time. The same must be said of the parts of the book dealing with actual relations of law and society. He lacked throughout the statistical, geographical, ethnological, ethological data, the shortcomings of which even now make a scientific foundation of sociology impossible in many directions. With respect to distant realms and peoples, savage tribes, Chinese, Japanese, Muscovites, Persians, and Turks, the only thing we can assert is that the relations of travelers and reports of missionaries, and even the historical works from which he endeavored to get some information, have been shown to have no scientific value. Consequently the only thing which he could really utilize was his own observation. In fact the most notable paragraphs which we read still with greatest interest rest simply upon that. In this category are the chapters on the British constitution and on the English national character heretofore spoken of; also the chapter on honor as the principle of monarchy, on (French) education in the monarchy, on the character of Spaniards, on court and courtiers, and the hints on the Holy Roman Empire and on Poland. From this point of view the *Lettres Persanes*, founded exclusively on observation, may pass for the best of his works. Another deficiency of the work of Montesquieu, which, however, he shares with modern sociologists, is the identification

of law and the rule of law which he found in the codes, textbooks, and law tracts. Hence, as he does not see the legal ruling of social institutions forming the intermediate link between the rule of law and the society, he fails to establish any interdependence between them. Where he tries to set forth the causes of some law he can but give conjectures, usually unsustained from a scientific point of view, mostly desultory and fallacious, often absurd and even ridiculous. The chapters on climate, geographical configuration, and religion are full of this. The reason is that practically he did not sufficiently take into account what he perceived theoretically, namely, that they must shape social institutions before they can produce rules of law. Again, when he enters into the inquiry as to the social and economical situation he is not capable of pointing out their consequences in law because he misses the social institutions through which they operate. The history of the world's commerce, and the treatise on feudal law, admirable as they are, appear in some measure suspended in the air. We may ask what they have to do in a book on the spirit of laws. It would be different if he took care to show how landed interest in the Middle Ages was influenced by the feudal military organization, and how the successive enlargements of commerce must necessarily have occasioned transformations and improvements in the law of contract.

In the legislative parts of the book his political views do not agree with modern ideas. His opinions are very liberal, but his tendencies are rather feudal. He was very proud of his descent from an ancient race, and his propositions are constantly influenced by this affection. He aims to reserve to the nobility as much as possible of the prerogatives of past ages. In this constitution the first chamber is reserved for the nobility, and is also the privileged court of noblemen, who, being exposed to the jealousy of the people, cannot be indicted before the popular tribunal. Trade is prohibited to the *noblesse*. Great trading companies ought not to be licensed, since they would be able to check the influence of other classes. Honor in its feudal conception is said to be the principle of monarchy. An ancient French law is recommended which fines a nobleman more heavily than a villain, but with respect to other punishments is more severe toward the people. On the other hand, his classical studies often led him to feel some attachment to the republics of antiquity, to their austere virtue, their patriotism, and their frugal-

ity. This old-fashioned bias in both directions has greatly injured the legislative parts of his book.

Finally Montesquieu does not realize the modern conception of development and evolution. Causality in society and in law, in his understanding, means only changes produced by outward circumstances. This is not yet the development imagined by Buckle and Savigny, which supposes changes coming from the nature of the subject changed, and therefore conditioned by the very structure of society. Only in some historical passages may we find traces of this notion. Causality in the mind of Montesquieu is still less evolution in the sense of modern natural philosophy, which implies a slow adaptation of the subject evolved to outward circumstances, and contains the idea of perfectibility, as every posterior stage is understood to present a higher degree of existence than those which preceded it. Montesquieu lacks this notion entirely. He does not know anything about the degrees of structural development. He compares the character of the Chinese and of the Spaniard (*Du caractère des Espagnols et celui des Chinois*). He puts on the same line the republic of Lycia and the Netherlands. In his opinion the expediency of law depends mainly on the intelligence and the good nature of the legislator who intends to meet the circumstance. If the emperors of China had been wise enough and kind enough to their people they would have been able to impart to it as perfect a constitution as that of England.

Montesquieu has suffered in full the tragedy of a genius anticipating his age. His contemporaries understood him only in what was relatively trifling and transient in his work; all that was qualified for immortality passed without an echo. Coming generations preferred to build up a new work from the basement instead of taking advantage of the foundations erected rather hastily by Montesquieu. Thus the effect of *L'Esprit des Lois* does not correspond with the mental force which it demonstrates. In view of modern scientific exigencies it is a capricious, dilettante, fragmentary work of a *grand seigneur* rather than of a scholar. Nevertheless it is a splendid work embracing immeasurable treasures of thought from which generations of scientists may derive ideas and suggestions. If it should fall to one's lot to reach the years of Methuselah one might try perhaps in the last century of his age, provided with the entire scientific armor of the next millennium, to carry out a work

such as Montesquieu intended. I do not think he would be obliged to make any fundamental alterations. I suppose he could keep the trestle and the framework, the leading ideas, the arrangement, and much of the details. In the main it would suffice to put a new argument under the heads of the chapters which could remain unchanged. Then certainly it would be one of the best books which could be written on the philosophy and the politics of law.

Eugen Ehrlich.

VIENNA.